Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1372

DR. DONALD E. MULES, D.V.M.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD C. COVAHEY, JR.
WILLIAM F.C. MARLOW, JR.
Attorneys for Petitioner
614 Bosley Avenue
Towson, Maryland 21204

The Paul M. Harrod Company, Baltimore, Maryland 21234

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**TO THE HONORABLE WARREN BURGER,
CHIEF JUSTICE OF THE UNITED STATES AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES,
GREETING:**

Petitioner, Dr. Donald E. Mules, D.V.M., prays a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned cause on February 24, 1976.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the conviction of Petitioner in a per curiam opinion, on all issues raised therein, including issues I, II, and III presented herein. The per curiam judgment of the Court of Appeals, which affirmed the judgment of the United States District Court for the District of Maryland, is attached hereto and made a part hereof, as appears in the Appendix, together with the order denying Petitioner's petition for rehearing.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit, denying Petitioner's petition for rehearing, was filed on February 24, 1976. The order denying rehearing let stand the judgment of that court, filed January 19, 1976, which affirmed the judgment of the trial court. This Court has jurisdiction by virtue of Title 28, United States Code, Section 1254, since rights, privileges and immunities were claimed under the Constitution of the United States, and were improperly denied by the District Court and by the Court of Appeals for this Circuit.

QUESTIONS PRESENTED

1. Whether the improper conduct of the prosecutor, including the accusations by implication and innuendo that Petitioner was involved in illegal distribution of controlled substances, was sufficiently prejudicial as to require reversal of his conviction upon all counts.

2. Whether conviction under the Controlled Substances Act should have been set aside, where, *inter alia,* an instruction on specific intent was refused, hand written notations made by Petitioner on bottles were considered "records," and records involuntarily seized by warrant and subpoena were considered to have been "furnished" to the Drug Enforcement Administration.

3. Whether conviction under 18 U.S.C. 1001 may be sustained on an indictment which, *inter alia,* fails to allege materiality and "jurisdiction" and where the evidence shows that the misrepresentations alleged were mere unsworn exculpatory denials, aggressively sought by an agent of the Drug Enforcement Administration, during informal compliance discussions without the benefit of warnings.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Fifth Amendment
Constitution of the United States, Sixth Amendment
Title 18, United States Code, Section 1001
Title 21, United States Code, Section 827 *et seq.*
(Controlled Substances Act)

The aforegoing provisions are set forth, in pertinent part, in the Appendix herein.

STATEMENT OF THE CASE

Petitioner, Donald E. Mules, D.V.M., was indicted in the United States District Court for the District of Maryland on May 30, 1974 (Exh. E). The indictment alleged violations of 18 U.S.C. 1001 and the Controlled Substances Act, 21 U.S.C. 827 *et seq.* Petitioner had been approached by agents of the Drug Enforcement Administration (hereinafter DEA) on August 30 of the preceding year; they stated their desire to examine his records concerning his use of cocaine. The DEA agents testified that Petitioner stated that he did not have an inventory for two separate dates (T. 97); furthermore, Petitioner acknowledged to them that he lacked certain records because he was unaware of the requirement for their being maintained (T. 972). The evidence established that Petitioner was a DEA registrant who ordered controlled substances only by use of a standard three part DEA form. The testimony of the vice-president of the distributor (from whom Petitioner obtained controlled substances) was that DEA procedures were routinely violated by his company (T. 60, 73, 77).

The evidence established that at the time of the August 30, 1973 visit, Petitioner was unable to produce several of the purchaser's copies of DEA order forms, apparently because they had been misplaced or lost (T. 98, 234). Upon a later visit (on April 16, 1974), the Petitioner had subsequently procured photostatic copies of the missing order forms (T. 14).

When queried as to the use of the cocaine, Petitioner responded that he had given dosages to horses (T. 204). At that time, Petitioner suggested that, because he administered the drug, he was exempt from various record keeping requirements (T. 203). One DEA agent observed a label on a five ounce chemical jar, and reduced the notations on the label to writing (T. 82). There was substantial dispute as to the meaning of the notations, including whether various abbreviations referred to teaspoons or tablespoons (T. 240, 242). The notations on the bottle bore dates, apparently reflecting the occasions when Petitioner had removed cocaine from that bottle (T. 102). The evidence failed to suggest that the government treated the label writing as a dispensing record, statement or inventory, under the Controlled Substances Act.

Nevertheless, the notations formed the basis for Count Six of the Indictment, charging the furnishing of fraudulent information in the form of "records" required to be kept under 21 U.S.C. 827 (a) (3).

A series of visits, phone calls, and admonitions followed. During one visit, the DEA agents were accompanied by Dr. Nicholas Booth, a veterinarian from the Food and Drug Administration. During these repeated

discussions, Petitioner freely related the treatment uses in which the cocaine had been used (T. 103, 104, 89, 105). Petitioner volunteered the formulae by which various medications were prepared (T. 90, 108, 105); however, the agents revealed considerable confusion as to whether grains or grams had been used therein (T. 226 to 228).

The false statements allegedly made by Petitioner, forming the basis for Counts Four and Seven (18 U.S.C. 1001), took place during these discussions.

Without prior notice, on April 16, 1974, DEA agents seized various records, reports and other documents from Petitioner's premises (T. 128, 133, 134, 271). Nine days later, pursuant to a subpoena duces tecum, William F. C. Marlow, Jr., of counsel for Petitioner, produced various other documents relating to Petitioner's use of controlled substances (T. 172, 173, 1024). Petitioner testified that many of the documents in counsel's custody, which had been subpoenaed, reflected Petitioner's attempt to reconstruct the history of his past treatment uses of cocaine.

Those documents seized pursuant to the search warrant, and those whose production was compelled by subpoena, formed the basis of Count Eight, charging the "furnishing" of fraudulent information in a record required to be kept 21 U.S.C. 827 (a) (3).

During the examination of the first witness, the following exchange took place:

> (T. 38) Q. By euthanasia, you mean when a animal has to be –

> (Mr. Covahey) Your Honor, I would object for the interest of expediency.
>
> (The Court) He's got to paint some background, counsel.
>
> (Mr. Covahey) Very well, Your Honor.
>
> ([Prosecutor]) What are you afraid of, Mr. Covahey?

During the cross-examination of Petitioner, the Prosecutor used the questioning process to suggest professional incompetence, as well as scheming to create fraudulent documents, on the part of the Petitioner.

> (T. 1098) "Q. I know you have been in practice twenty years, Doctor, and thank God there aren't more dead animals." * * *
>
> "So they looked around in other places for records. Some of your records, your phoney inventory was in the basement, wasn't it?
>
> (Mr. Covahey) Objection.
>
> (The Court) Objection sustained.
>
> (Mr. Covahey) There has never been the word phoney introduced in this case.
>
> (The Court) And don't use it, counselor.
>
> (Mr. Radding) Yes, sir."

Government counsel further used the device of cross-examination to suggest a knowledgeability in Petitioner about cocaine abuse by humans.

> (T. 1289) "Q. Not too many honest people want to use cocaine, snort cocaine, do they, Doctor Mules?
>
> (Mr. Covahey) Objection. Wait a minute.
>
> (The Court) Sustained."
>
> * * * * *
>
> (T.1121) Q. And you got the powder and you tried it in the nebulizer treatment, is that correct? A. That's correct.
>
> Q. And that's shooting the cocaine or blowing into the nose; the (T. 1122) horse inhales the cocaine preparation? A. Blowing the vapor into the nose that would have the cocaine in it probably.
>
> Q. Isn't that the way people get high on cocaine too, through the nose?
>
> (Mr. Covahey) Objection.
>
> (The Witness) I don't know.
>
> (Mr. Radding) He said he doesn't know.
>
> (The Court) He has answered it.

The prosecutor then attempted to associate Petitioner with one Pete Curtis, and specifically to Curtis' arrest for

possession of four grams of cocaine hydrachloride flakes (T. 1367). Thereupon, in colloquy before the bench, it was established that, in fact, Curtis had been found not guilty of the controlled substances offense, and that Curtis had been employed by Petitioner's wife (T. 1368). Subsequently, during the government's cross-examination of a Baltimore City Police Officer called as a character witness for the Petitioner, the Prosecutor inquired:

> (T. 1567) Are you aware that some of your brother officers in the Baltimore City Police Department arrested one of Dr. Mules' agents for possession of cocaine? A. No, sir, I wasn't aware of that.
>
> (Mr. Covahey) Objection, Your Honor.
>
> (The Court) Sustained.

Motions for mistrial, made at both mentions of the collateral arrest of Curtis, were denied.

In closing argument, government counsel employed the following passages:

> When you're dealing with narcotics, the most dangerous drugs known to man, you've got to follow what the Government says. Of course, if you don't we're all in trouble, and I would urge upon you that is what has happened here. * * *
>
> Ladies and gentlemen, why are people, even lawyers, stupid enough not to file their income tax returns, when they know their withholding and their social security records are down in Washington, yet lawyers do that and other people

do that. They don't file. They know better. Why are people still stupid enough to rob banks, even though they know there are cameras up there and they're going to be identified, but there isn't a week that goes by in this Courthouse when we don't have a bank robbery trial. I can't tell you that. * * *

I can tell you, from my experience as a criminal (C.A. 12) lawyer and prosecutor that very few people who commit crimes really expect to be caught, and they always feel they're smart enough to outsmart the law. That, I can tell you. * * *

These people are professsionals. They work for the United States Government. Like myself. Like anybody else who works for the Government, they're paid every other Friday, whether or not they made a case, whether or not they testify in Court, whether or not there is a conviction, whether or not somebody goes to jail, it doesn't matter . . . A scientist, God forbid you should question a scientist's integrity. A scientist is devoted to his integrity and he's not going to lie for the Government who pays his salary or anybody else.

In its charge to the jury, the trial court refused to grant the Defendant's Instruction 3A and Defendant's Instruction 7 (Exhibits C and D), requiring a showing of specific intent by the Petitioner to convict under Counts One and Two. Following the return of the verdict of guilty as to six counts, the trial court denied Petitioner's Motion for a New Trial (Exh. F).

The judgment of the District Court was affirmed in a *per curiam* opinion by the United States Court of Appeals for the Fourth Circuit (Exh. A) and the Court of Appeals denied Petitioner's Petition for Rehearing (Exh. B). Petitioner duly petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE IMPROPER CONDUCT OF THE PROSECUTOR, INCLUDING THE ACCUSATION BY IMPLICATION AND INNUENDO THAT PETITIONER WAS INVOLVED IN ILLEGAL DISTRIBUTION OF CONTROLLED SUBSTANCES, WAS SUFFICIENTLY PREJUDICIAL AS TO REQUIRE REVERSAL OF HIS CONVICTION UPON ALL COUNTS.

The federal judiciary has suffered no dearth of abstract generalities by which to consider allegations of improper conduct by government prosecutors. It has been said that the United States Attorney has the responsibility to abstain from "know nothing" appeals to ignorance, and that he is precluded from intimating his own opinions and attitudes on matters of expert knowledge, *United States v. Brawner*, 471 F.2d 969 (D.C. 1972); and that the government should be disallowed from oratorical flights which seriously endanger the defendant's right to a fair trial, *United States v. D'Anna*, 450 F.2d 1201 (2d Cir. 1971). What is lacking is an ample standard by which such conduct may be gauged in terms of its likely prejudicial effect upon the right to a fair trial of an accused. One test of "untoward remarks" considers "the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error." *United States v. Callanan*, 450 F.2d 145, 151 (4th Cir. 1971), quoting *Gaither v. United States*, 413 F.2d 1061, 1079 (D.C. Cir. 1969).

The Third Circuit, for example, has criticized "overly dramatic, unnecessary characterizations" of defendants by one prosecutor, but sustained the trial court where the impropriety did not materially contribute to conviction. *United States v. Somers*, 496 F.2d 723 (1974).

Cases are legion wherein prosecutorial conduct, when considered together with other error, has resulted in reversal; but in these cases as well, no clear standard has emerged by which to consider the relative depth of the affront to a fair trial. In *United States v. Gonzalez*, 488 F.2d 833, (1973), the Second Circuit considered both a confusing jury charge and the improper summation by the government, concluding that "either of appellant's arguments, considering the charge and the summations might be sufficient to reverse the decision below," at p. 836. In that case

> The prosecutor opined that"... you have to be born yesterday to believe..." appellant's defense, that appellant's testimony "...is so riddled with lies that there is only one word that comes out of his testimony; guilty, guilty, guilty," and that appellant was "...caught dead to rights...red-handed." The prosecutor characterized appellant's defense as a "pack of lies," "an insult to your intelligence," and "a concocted defense." *Id.*

The obligation of the federal prosecutor to pursue questions through fair and proper means was clarified by this court over forty years ago in the following terms, *Berger v. U.S.*, 295 U.S. 78, 88 (1935):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation

> to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The application of that standard has not proven an easy task for the courts of appeal of the various circuits. In one case decided in 1973 by the District of Columbia Circuit, a conviction of possession of heroin with intent to distribute was set aside because of the prosecutor's references to allegations not in evidence. *United States v. Whitmore*, 480 F.2d 1154. The issue of prejudicial misconduct arose from an affidavit given by police (supporting a search warrant) wherein one "Roscoe" was alleged to have sold heroin to an informant at a given address. Upon execution of the warrant at that address, over 10 grams of heroin were seized. Although neither the warrant nor the supporting affidavit were in evidence, the prosecutor "repeatedly" referred to them and was at pains to prove that the appellant used the name "Roscoe", particularly during cross-examination of the defendant, at pp. 1156-57.

In closing arguments, the prosecutor used the alleged alias, together with the police affidavit alleging that

defendant was "selling dope", to suggest that the defendant had been merchandising heroin. The circuit court particularly noted that

> There was no direct evidence before the jury that the appellant had sold narcotics to anyone; the only proof touching that point was the inference that might have been drawn from the evidence seized by the police in the apartment. *Id.* at 1158.

The rule applied by the D. C. Circuit, then, is that in a trial for possession of narcotics with intent to distribute a prosecutor's use of a mere inference that the defendant was selling narcotics is impermissibly prejudicial, where the only evidence of such sales is derived from "suggestion and insinuation," 480 F.2d at 1158. The application of that rule would result in the reversal of the instant case.

Similarly, the Ninth Circuit has held reversible error the allowance of a rebuttal closing argument by the government implying that "a system of checks and balances" assured that an indictment was returned only because defendant had committed a crime, *United States v. Cummings*, 468 F.2d 274 (1972). It is noteworthy that, in *Cummings*, the prosecutor did not expressly suggest that "the system" assured that Cummings was guilty as charged, but only described the process by which an investigation proceeded from a Department of Justice agent to the grand jury, at pages 277-78. Furthermore, offending argument was directly in response to defense counsel's attack upon the government's evidence. Thus, the situation posed in *Cummings* was parallel to that presented by the instant petition, where, in closing argument, the prosecutor implied

that, by virtue of a bias-free "system" within the Drug Enforcement Administration, the expert testimony of a Drug Enforcement Administration chemist was conclusively accurate.

It is axiomatic that, in cases alleging improper maintenance of records of controlled substances, the likelihood of raising in the jurors' minds the spectre of narcotics abuse is ever present. Accordingly, a high danger of prejudice ensues where, as in the case at bar, the prosecutor engages in accusation by implication and innuendo. This threat to a fair and impartial trial is especially manifest in view of widespread media treatment of narcotics "pushing" and drug-related problems in both factual and fictional portrayals. In that light, the conduct of the Assistant United States Attorney assumes particular significance, as it did in *United States v. Whitemore, supra,* where the prosecutor advanced a plain accusation, albeit only by insinuation, that the defendant was selling narcotics, that people like the defendant "tear up the lives of many young people . . . these are the kind of people that are degrading this city," 480 F.2d at 1158.

In the case at bar, government counsel at various points accused defense counsel of being "afraid" and accused the Petitioner of professional incompetence and of creating "phony" inventories of controlled substances. The prosecutor in the instant case tried to plant the suggestion, by way of rhetorical inquiry upon cross examination, that Petitioner could comment from his personal expertise upon the character of people who "snort cocaine", and that Petitioner was somehow connected with the arrest – for possession of cocaine – of one Pete Curtis. These were

questions whose obvious import and purpose was not interrogatory, but accusatory, and could only have been intended to suggest that Petitioner was involved in illegal distribution of cocaine.

II.

CONVICTION UNDER THE CONTROLLED SUBSTANCES ACT SHOULD HAVE BEEN SET ASIDE, WHERE, *INTER ALIA*, AN INSTRUCTION ON SPECIFIC INTENT WAS REFUSED, HANDWRITTEN NOTATIONS MADE UPON BOTTLES WERE CONSIDERED "RECORDS," AND RECORDS INVOLUNTARILY SEIZED BY WARRANT AND SUBPOENA WERE CONSIDERED TO HAVE BEEN "FURNISHED" TO THE DRUG ENFORCEMENT ADMINISTRATION.

Of the six counts upon which Petitioner was convicted, four counts alleged violations of the Controlled Substances Act. Counts One and Two charged Petitioner with failing to keep records of cocaine distributed to him, and dispensed by him; Count Six charged the furnishing of fraudulent information in the form of records required to be kept under the Act; Count Eight charged the knowing and intentional furnishing of fraudulent material and other required records.

Proof adduced at trial demonstrated that the "records" mentioned in Count Six were in fact notations placed on a bottle of cocaine hydrochloride denoting dates when various amounts were removed (to be placed in other containers

containing Petitioner's cough preparation). The records allegedly "furnished" by Petitioner, as recited in Count Eight, were in part seized by the Drug Enforcement Administration pursuant to a search warrant and, in part, produced before the grand jury by Petitioner's counsel under subpoena.

That the government was unable to cite any case law to justify these latter two constructions, in an otherwise exhaustively annotated brief to the court of appeals, attests to the paucity of authority on these questions. On the other hand, the federal case reporters bear silent witness to the prolific increase in prosecutions under the Controlled Substances Act. While this Court has provided some interpretive guidance with which to approach the Act, *United States v. Moore*, _____ U.S._____, 96 S. Ct. 335 (1975), the Court intimated at the same time that questions of interpretation remained to be reached, at page 347.

The interpretation of notations made by Petitioner on the label of a bottle of cocaine hydrochloride, as records required to be kept under 21 U.S.C. 827 (a) (3), is an example of the problems posed by the Act. Petitioner denied at trial that those notations constituted a dispensing record, such as is required to be maintained whenever a controlled substance is "dispensed." The government's chief witness, DEA Special Agent Miller, testified that he observed the notations when he picked up the bottle, at Petitioner's premises, for the purpose of comparing the serial number thereon with his own records; he then inquired of Petitioner as to their meaning. From the Petitioner's explanation that those notations denoted dates when certain amounts were transferred to other containers, the jury was permitted to conclude that the notations were "dispensing" records.

21 U.S.C. 827 (a) (3) requires Drug Enforcement Administration registrants who dispense a controlled substance to maintain on a current basis a complete and accurate record of each such substance dispensed by him, except that the registrant is not required to maintain a perpetual inventory or maintain records when Schedule II controlled substances are administered by the practitioner, Section 802 (10) of Title 21, United States Code, defines the word "dispense" as follows:

> (10) the term 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to ultimate user or research subject.
>
> * * *
>
> (25) the term 'ultimate user' means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

Assuming arguendo that evidence at trial proved that the defendant "dispensed" cocaine hydrochloride during the relevant time periods noted, the subject notations copied by agents of the Drug Enforcement Administration did not comprise a dispensing record required to be kept under Section 827. There exists no requirement that a practitioner

make a written memorandum on container of Schedule II narcotic controlled dangerous substances with respect to the dates and amounts removed. The record keeping requirements are only invoked when an act of dispensing takes place as defined by the statute.

The mere transfer of a controlled substance from one container to another does not trigger a requirement that written memoranda of such a transaction be kept. Thus it is difficult to imagine how the notations on the bottle, plainly kept by Petitioner for his own use, could be interpreted as "records required to be kept" under the Act. The government's answer to this issue, in its brief on appeal, is that the jury was entitled, as finder of fact, to so view the bottle markings. However, in view of the comprehensive regulatory scheme embraced by the Act, together with the plenary rules promulgated by DEA to effect the statutory scheme, it seems inconceivable that so central an issue as what constitutes required records could have been left undefined for the interpretation of juries.

The characterization of documents forcibly seized from Petitioner, under search warrant and subpoena, as having been "furnished" is equally troubling; again, the definitional issue is one unresolved by extant case law. Count Eight charged Petitioner with furnishing fraudulent information in (and omitting material information from) records required to be kept under 21 U.S.C. 827 (a) (3). The records mentioned in Count Eight were, in part, seized without prior notice, pursuant to a search warrant, from Petitioner's residence, and included order forms, billing records, and treatment records. The records to which reference is made in Count Eight also included those which were produced by

Petitioner's counsel, pursuant to a subpoena, before the grand jury; the subpoena required counsel to produce any records in his possession relevant to Petitioner's use of Schedule II controlled substances. No other records, other than those submitted under compulsion, formed the basis for the contention in Count Eight that records had been intentionally "furnished" by Petitioner.

The term "furnish" necessarily embraces an element of willingness and voluntary action. In *Decker v. United States,* 140 F.2d 375 (4th Cir. 1944), the court considered various definitions which had evolved from the case law, concluding that the word "furnish" is "one of very broad and general denotation," at p. 377. Thus, in that case, defendant voluntarily supplied a statement of production costs, pursuant to a request of a Navy representative, and was held to have "furnished" it. This Court, in considering a contract clause including the word "furnished," stated, "to furnish means to supply," *Bliss Co. v. United States,* 248 U.S. 37, 45 (1918).

Only by the most bizarre construction could it be suggested that the acquiescence to official compulsion, posed in the case at bar, amounted to a "furnishing" of records. Here, too, the government in its brief on appeal could cite no authority for a contrary position. The need for clarification of this unresolved issue, then, is plain. The construction urged by the government would compel DEA registrants to destroy private records, not directly related to use of controlled substances, which might contain errors. If such a construction could have been the intent of Congress, Petitioner respectfully submits that it is the function of this Court to so state.

Counts One and Two of the indictment charged Petitioner with failure to keep records of cocaine distributed to him, and failure to keep records of cocaine as dispensed by him. The trial court, over objections, denied counsel's requested Instruction 3A (Ex. C) and 7 (Ex. D) which would have instructed the jury that, in order to convict the Petitioner of Counts One and Two of the indictment, they would have to find a specific intent to violate the statute. In order to determine the propriety of the court's action in refusing to instruct the jury that specific intent was an essential element of Counts One and Two, recourse must be first had to the literal language as employed in the statute.

The conduct proscribed in Counts One and Two was made criminal by Congress in Public Law 91–513, Sections 402 (a) (5) and 402 (c)(2)(A), codified as 21 U.S.C. 842 (a)(5) and 21 U.S.C. 842 (c)(2)(A). Significantly, Section (c)(2)(A) specifically provides that an essential gravamen of the offense to sanction criminal penalties is that it was "committed knowingly and the trier of fact specifically finds that the violation was so committed . . .". Absent such knowledge, the law provides in (c)(1) that any person violating the Section shall be subject to a civil penalty. In addition, 21 U.S.C. 842 (a) specifically requires that the conduct also have been "unlawful." The indictment was properly drawn within the context of the statute in apprising the defendant that his conduct would have to be found by the trier of fact to be both unlawful and knowing before he could be found guilty of the offense alleged.

In *United States v. Patillo*, 431 F.2d 293, (4th Cir. 1970), the court had occasion to apply the rules of statutory construction to a statute making threats against the President a criminal act. The statute in that case, 18

U.S.C. 871, provided that in order to fall within the purview of the statute, the threats had to have been made "knowingly and willfully." In applying the statute to the conduct of *Patillo*, Judge Craven at page 297 quoted from Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat 76, 5 L. Ed. 37 (1820):

> " The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself . . . The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. "

The court in reversing *Patillo's* conviction did not examine the legislative history of the statute involved as it found there was no ambiguity in the words used under the decision of this Court in *Watts v. United States*, 394 U.S. 705 (1969), which involved construction of the identical statute before the court in *Patillo*. Unlike the present case, the statute before the Court in *Patillo* and *Watts* was phrased in the conjunctive in that it required the conduct to have been both knowing and willful. However, in construing "willfully" in *Patillo*, the court quoted from the Supreme Court's decision in *United States v. Murdock*, 290 U.S. 389 (1933), which stated:

> "the word [willfully] often denotes an act which is intentional, or knowingly, or voluntary as

> distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose."

"Willfully" was there defined in the disjunctive as conduct which was either "intentional, or knowing or voluntary," all subject to the important caveat that when used in a criminal statute, the conduct "generally" was accompanied by a bad purpose.

The trial court in instructing the jury as to the elements of Count One of the indictment, after attempting to define knowingly, told the jury "however it is not necessary for you to find that the Government has shown that the defendant had any specific intent to violate the statutory record keeping requirements . . ." Instructing on the elements of Count Two of the indictment, the trial judge again specifically instructed the jury that it was not necessary for the government to prove specific intent as an element of that offense. Defendant's Instruction 3A and 7, as initially denied by the Court, and excepted to by the Petitioner prior to the instructions, renewed, subsequent to the instructions, and again requested, was all to no avail, as the trial court persisted in its refusal to instruct the jury that specific intent was a requisite element of Counts One and Two.

It was the manifest intent of Congress to punish by criminal sanctions only those proscribed actions under the Act which were committed with specific intent. It would otherwise be difficult indeed to appreciate the clear distinction drawn by Congress between the civil and criminal provisions of the Controlled Substances Act. Particularly in

view of the growing use of the Act by the government in its effort to regulate access to, and use of, controlled substances, there exists compelling cause for this Court to rule expressly upon the requirement of a showing of specific intent to sustain a conviction under 21 U.S.C. 842 (c)(2)(A).

III.

WHETHER CONVICTION UNDER 18 U.S.C. 1001 MAY BE SUSTAINED UPON AN INDICTMENT WHICH, *INTER ALIA*, FAILS TO ALLEGE MATERIALITY AND "JURISDICTION," AND WHERE THE EVIDENCE ADDUCED AT TRIAL SHOWS THAT THE MISREPRESENTATIONS ALLEGED WERE MERE UNSWORN EXCULPATORY DENIALS, AGGRESSIVELY SOUGHT BY AN AGENT OF THE DRUG ENFORCEMENT ADMINISTRATION, DURING INFORMAL COMPLIANCE DISCUSSIONS WITHOUT THE BENEFIT OF WARNINGS.

The various courts of appeal which have considered 18 U.S.C. 1001 have held that the offense described by that statute embraces various essential elements, which in turn have been read from the apparent intent of Congress in enacting Section 1001 and with a view toward according the statute a reasonable and constitutional meaning. It has been held that materiality is essential to the offense, for example, so that a valid indictment must either expressly allege materiality or otherwise indicate by words of similar import that the falsity charged is material. *United States v.*

McGough, 510 F.2d 598, 602 (5th Cir. 1975); *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir. 1962); *Gonzales v. United States*, 286 F.2d 118, 121 (10th Cir. 1960), certiorari denied, 365 U.S. 878.

The standard by which the sufficiency of an allegation of materiality is measured has been accorded varying treatment among the various courts of appeal. For example, in *McGough*, appellant was indicted for the alleged filing of four false financial statements on various specified dates with the Rural Electrification Administration, but the district court dismissed the indictment for the express reason that the indictment did not expressly allege materiality, 510 F.2d 598, 601-602. The appellate court determined that the proper test for a sufficient allegation of materiality in the indictment was whether the statement at issue could conceivably have a tendency to influence or affect a government function; it noted that the four counts of the indictment before it were "admittedly terse" at pages 602-603. In fact, however, unlike the case at bar,

> each count clearly identified the specific financial statement involved, the specific item which is alleged to be false, the specific manner in which the item is alleged to be false, *i.e.*, an understatement, and the amount of each understatement.

Specifically, each count of the indictment alleged the amount of each understatement, ranging from $44,000 to $59,000, that McGough had misappropriated funds which should have been posted to accounts receivable on the statements, and that McGough knew each statement to be false, at pages 600-601, 603. The court then considered the

role of the REA in overseeing the financial status of Federally subsidized utility cooperatives, concluding that where the indictment alleged four consecutive understatements of that magnitude, its implicit allegation of materiality was sufficient.

A somewhat different standard was applied in *Dear Wing Jung v. United States, supra*, in which the Ninth Circuit upheld the sufficiency of an indictment under Section 1001 in the face of the appellant's assertion that the indictment failed to allege materiality. The count at issue alleged, in pertinent part, that defendant had misrepresented that he was a citizen of the United States in naturalization proceedings involving his wife; it was alleged also that he had misstated his true name. Noting that the allegation of facts warranting the inference of materiality may obviate the need for an express aliegation of materiality, the court held that a finding of materiality in the indictment was "not unreasonable." The court reasoned that, in those circumstances, the interest of the government is material in knowing "the true name and nationality" of one who volunteers himself as a witness on an applicant's behalf, at page 75. Thus, the Ninth Circuit effectively denied the requirement that the indictment allege a material governmental interest in the subject of the misrepresentation. In its implicit suggestion in *McGough* that the indictment considered therein was of borderline sufficiency, the Court of Appeals for the Fifth Circuit implied a higher standard of specificity, at pages 602-603.

By either standard, or any approved standard, the language employed in Counts Four and Seven of the case at bar lack any allegation which could be reasonably construed

as suggesting materiality. In our case, there appear no facts warranting an inference of materiality, but merely the bald assertion that the defendant "knowingly and willingly made false and fraudulent representations." While it would appeal from the present case law that the Court of Appeals in the instant case was in error for failing to hold both counts insufficient for lacking an allegation of materiality, the case at bar serves to underscore the lack of a plain standard by which such indictments may be measured for adequacy.

Similarly, there appears among the circuits an unresolved issue as to whether an indictment states an offense, where it lacks an implied or express assertion that the alleged misrepresentations involve a "matter within the jurisdiction of" a federal agency. In the case at bar, counts four and seven allege that the Petitioner made false representations "to an agent of the Drug Enforcement Administration" but failed to allege that those statements concerned a "matter within the jurisdiction of" that agency. Under the standard ennunciated by this court in *Hamling v. United States*, 418 U.S. 87, 117 (1974), the counts are fatally defective for their failure to "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense," quoting *United States v. Carll*, 105 U.S. 611, 612 (1882). In the Fifth Circuit case of *Rolland v. United States*, 200 F.2d 678 (5th Cir. 1953), the indictment alleged that defendants had falsely stated to the Department of Labor agents that certain payments, determined by that agency to be owed to one employee for overtime, had been made. That court upheld the indictment under the test applied in *States v. Moore*, 189 F.2d 92, 94 (5th Cir. 1951), in which the indictment had been held sufficient,

> charging as it does both that the matters . . . falsely misrepresented were material and that they were matters within the jurisdiction . . . of the Division.

The indictments in both cases contained averments that the misrepresentations alleged were within the jurisdiction of "the Division," unlike the case at bar wherein Counts Four and Seven lack any allegation in kind. While the *Moore* indictment was sufficient, there was in the *Rolland* indictment no allegation that (1) the wages were subject to the authority of the agency, or (2) any payment was actually due the employee under the statute, at page 680. On the other hand, in *Friedman v. United States*, 374 F.2d 363 (8th Cir. 1967, an indictment under Section 1001 was set aside. That circuit applied a distinction made between the "investigative" and the "dispositional" jurisdiction of governmental agencies. Appellant in *Friedman* contended, where he was charged with lying to FBI agents in attempting to initiate a civil rights prosecution against a state highway patrolman, the "jurisdiction" of the FBI to investigate was not the "jurisdiction" envisaged by Section 1001. That court did acknowledge that a false statement could hinder the FBI in an investigation, but that absent any suggestion in the indictment that the falsity caused some real corruption of it authorized activities, the indictment failed to state an offense.

The proof requisite to sustain a conviction under Section 1001 has been the subject of considerable case law. In considering applicability *vel non* of Section 1001 to "hot oil" shipments, this Court in *United States v. Gilliand*, 312 U.S. 86, found a Congressional intent to protect the government against false pecuniary claims and to protect

governmental agencies from perversion of their normal functioning. This broad standard was extensively explained by Judge Chestnut in the much-cited case of *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955). According to *Stark*, the purpose of Section 1001 is

> to protect the government being the victim of some positive statement . . . which has the tendency and effect of perverting its normal proper activities. *Id.* at 205

The court in *Stark* specifically determined that Section 1001 would not apply where, as here, the defendants did not volunteer information, were not seeking any action by the government or making any claim against it, or seeking government action against other persons.

While the phrase was not used in the opinion, *Stark* thereby formulated the "exculpatory-no" rule. That doctrine has been adopted by the Fifth Circuit, *Paternostro v. United States*, 311 F.2d 298 (1962) and the Eighth Circuit, *Friedman v. United States, supra.* This judicially conceived construction apparently "originated at least in part from latent distaste for application that is uncomfortably close to the Fifth Amendment," *United States v. Lambert*, 501 F.2d 943, 946, n.4 (1974).

The rule has apparently been rejected by the Ninth Circuit, *Brandow v. United States*, 268 F.2d 559 (1959) and the Second Circuit, *United States v. McCue*, 301 F.2d 452 (1962), certiorari denied, 370 U.S. 939, reh. denied, 374 U.S. 858.

This Court has suggested that a Fifth Amendment defense, related to constitutional duress, would be possible, *United States v. Knox*, 396 U.S. 77 (1969), but that the issue should be determined at trial. In that case, defendant had been prosecuted under Section 1001 (as well as the Internal Revenue Code) for false statements on a wagering registration form; he urged that his alternatives were constitutionally unpalatable – if he filed forms truthfully under Section 4412 of the Internal Revenue Code, he was subject to state prosecution for gambling, whereas if he gave information falsely he was subject to federal criminal sanction.

The split of authority among the courts of appeal as to the "exculpatory-no" exception, considered together with the *Knox* duress issue, show that clarification of any Fifth Amendment "penumbra" applicable to proceedings under Section 1001 is a matter of particular public importance. In the instant case, the responses given by Petitioner were not affirmative representations, but merely answers to the inquiries of a Drug Enforcement Administration agent, and were devoid of any aggressive or voluntary aspect. There was in these discussions no suggestion of any critical factor which would threaten to pervert the assigned functions of the Drug Enforcement Administration. These statements at issue here were oral and unsworn, and thereby lent an aura of informality which could have for no reasonable man on notice of the consequences of inaccurate answers.

> [I]f we adopt the literal application of the statute, anything more than a casual social conversation with a government employee would, without warning, subject the speaker to the possibility of severe criminal punishment, *Friedman v. United States, supra,* at p. 366.

That some federal courts have been reluctant to apply Section 1001 to such situations has resulted in considerable confusion as to the precise applicability of the statute. Thus, in *United States v. Bush*, 503 F.2d 813 (5th Cir. 1974), Section 1001 was held inapplicable to an affidavit signed by the defendant, where Internal Revenue Service agents had aggressively sought to obtain a statement, defendant appeared to be under suspicion when the statement was prepared, and where he was not warned of the possible consequences of misstatement. In that case, it appeared that the Internal Revenue Service had initiated an investigation of the defendant's own finances, although it was never suggested to him that he was under suspicion. Yet the same circuit held one year later that a conviction under Section 1001 would be sustained upon defendant's unsworn responses to questions posed at a fact-finding hearing, despite the exclusion by the trial court of testimony and argument as to whether the unsworn statements were even considered by the hearing officer, *United States v. Krause*, 507 F.2d 113 (5th Cir. 1975).

The unresolved constitutional problems posed by Section 1001 were neatly summarized by Judge Gessell in *United States v. Ehrlichman*, 379 F. Supp. 291 (D.C. 1974). In that case, it was noted that the principal difficulty with invoking the statute to punish those who lie to a federal agency – where there is no legal obligation to respond to inquiry – is that the prosecution can thereupon demand sanctions more onerous than those imposed under the perjury statute, 18 U.S.C. 1621. Furthermore, these sanctions could be imposed under circumstances wholly lacking in those safeguards normally provided under the perjury statute. Specifically, "there is no requirement of an oath, no strict rule of materiality, no guarantee that the

proceeding will be transcribed or reduced to memorandum," at page 292.

The most summary examination of federal case law demonstrates the common practice of the government in joining charges under Section 1001 to indictments alleging other substantive offenses, as in the instant case. Therefore, the exceptional and general importance of the need for definitive uniformity of interpretation cannot be reasonably questioned. Petitioner submits that the case at bar provides a compelling opportunity for this Court to review 18 U.S.C. 1001, and to resolve the continuing conflicts as to the requisite elements of a sufficient indictment thereon, and of sufficient proof thereof.

CONCLUSION

The considerable societal interest in an effective regulation of controlled substances should not displace the requirement of an ordered deliberative process. Conviction in the case at bar resulted, in significant measure, from the disruption of that process, as every point argued herein demonstrates. The issues raised by Petitioner are of especially significant public concern, since the prosecutions under the Controlled Substances Act (together with 18 U.S.C. 1001) present unusual dangers of abuse and misinterpretation. Petitioner respectfully urges that this petition be granted, so that the issues raised herein may receive full and proper consideration by this Honorable Court.

Respectfully submitted,

EDWARD C. COVAHEY, JR.
WILLIAM F.C. MARLOW, JR.
Attorneys for Petitioner

614 Bosley Avenue
Towson, Maryland 21204

APPENDIX

EXHIBIT A

PER CURIAM OPINION OF THE COURT OF APPEALS AFFIRMING PETITIONER'S CONVICTION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 75-1585

United States of America,
Appellee,

versus

Donald E. Mules, DVM, DEA Registrant
#AM 1531309,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

Argued January 6, 1976 Decided Jan. 19, 1976

Before HAYNSWORTH, Chief Judge, BUTZNER and WIDENER, Circuit Judges

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Edward C. Cohahey, Jr., and William F. C. Marlow, Jr., for Appellant; Peter G. Beeson, Attorney, United States Department of Justice (Jervis S. Finney, United States Attorney, on brief) for Appellee.

PER CURIAM:

We have carefully considered each of the several points raised on appeal by the appellant and have concluded that they do not warrant a reversal of his conviction of violations of record-keeping requirements in connection with controlled drugs.

Because our consideration of the briefs, the record, and the argument in this case reveals no reversible error, we hereby affirm appellant's conviction.

AFFIRMED.

EXHIBIT B

DENIAL OF PETITION FOR REHEARING BY THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 75-1585

United States of America,
Appellee,

versus ORDER

Donald E. Mules, DVM, DEA
Registrant #AM 1531309,
Appellant.

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Butzner and Judge Widener,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT

/s/ Clement F. Haynsworth,
Chief Judge, Fourth Circuit

February 20, 1976

FILED
FEB 20 1976
WILLIAM K. SLATE, II
CLERK

A True Copy, Teste:
William K. Slate, II
By Joanne Bryan

A. 4

EXHIBIT C

PETITIONER'S TRIAL PRAYER (Instruction 3A), DENIED BY THE TRIAL COURT

INSTRUCTION 3A

LADIES AND GENTLEMEN OF THE JURY you are instructed that Counts One, Two and Three of the Indictment contain as an essential element thereof that Dr. Donald E. acted unlawfully. In that connection you are instructed that unlawfully means contrary to law. So to do an act unlawfully means to do wilfully something which is contrary to law. An act is done wilfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law. Therefore, you are instructed that by the use of the term unlawfully in Counts One, Two and Three of the Indictment that before you can convict the Defendant, Dr. Donald E. Mules, you have to find that the act was done wilfully within the context of wilfully, defined in these Instructions, and with the specific intent to do something the law forbids, and in this connection you are to consider the definition of specific intent as contained in these Instructions.

Devitt and Blackmar, Fed. Jury Practice and Instructions 2d., Section 16.11

A.5

EXHIBIT D

PETITIONER'S TRIAL PRAYER (Instruction 7), DENIED BY THE TRIAL COURT

INSTRUCTION 7

LADIES AND GENTLEMEN OF THE JURY with respect to each and every offense charged you are instructed that to constitute the offenses charged in the indictment you must find an intent on the part of the Defendant to do or not do the acts which are alleged as criminal acts by the Prosecution. In this connection you are further instructed that the burden is on the Prosecution to establish beyond a reasonable doubt that the Defendant possessed an intent either to commit or not to commit the acts alleged. In order to possess sufficient criminal intent to constitute the crimes alleged you must find and be satisfied that the Prosecution has proven beyond a reasonable doubt that the Defendant was aware of the existence of all those facts which made his conduct criminal with respect to the offenses alleged. The law characterizes this awareness by use of the phrase "mens rea", which is the Latin phraseology meaning criminal intent. Intent has been defined by the Supreme Court of the United States as meaning that at the time the acts were committed or omitted that the Defendant was possessed of a "vicious will". You may not convict the Defendant, Dr. Donald E. Mules, of any of the offenses alleged unless you find beyond a reasonable doubt and to a moral certainty with respect to such offenses that he was possessed of a vicious will.

U.S. v. Crimmins, 123 F 2d 271 (1941 2nd. Cir.)
Dennis v. U.S., 71 S.Ct. 857, 341 U.S. 494, 95 L.Ed. 1137 (1951)
Morissette v. U.S., 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)

EXHIBIT E

INDICTMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	CRIMINAL NO. 74-0336
	:	
	:	(Failure to keep and furnish
	:	the required order forms and
	:	records, 21 U.S.C. §842(a)(5);
v.	:	Fraudulent statements made to
	:	agents of the United States
	:	Government, 18 U.S.C. §1001;
	:	Furnishing fraudulent material
DR. DONALD E. MULES, DVM	:	information for required
DEA Registrant #AM 1531309	:	records, 21 U.S.C. §843(a)(4))

The Grand Jury for the District of Maryland charges:

On or about the 30th day of August, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

unlawfully and knowingly did refuse and fail to keep on a current basis, a complete and accurate record of each Schedule II controlled substance, to wit: cocaine, distributed to him at A. J. Buck and Company, 10534 York Road, Cockeysville, Maryland, for the statutory period of two years dating from the 30th day of August, 1971, to the 30th day of August, 1973, as he was required to do by Title 21, United States Code, Section 828(a) and (c)(2).

21 U.S.C. §842(a)(5)

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

On or about the 30th day of August, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

having dispensed a controlled substance, to wit: cocaine, unlawfully and knowingly did refuse and fail to keep on a current basis, a complete and accurate record of each controlled substance dispensed by him in the course of his veterinary practice for the statutory period of two years dating from the 30th day of August, 1971, to the 30th day of August, 1973, as he was required to do by Title 21, United States Code, Section 827(a)(3) and (b).

21 U.S.C. §842(a)(5)

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

On or about the 13th day of September, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

having dispensed a controlled substance, to wit: cocaine, unlawfully and knowingly did refuse and fail to keep on a current basis, a complete and accurate record of each controlled substance dispensed by him in the course of his veterinary practice within the statutory period of two years, the dates being the 30th day of August, 1973, to the 13th day of September, 1973, as he was required to do by Title 21, United States Code, Section 827(a)(3) and (6).

21 U.S.C. §842(a)(5)

COUNT FOUR

And the Grand Jury for the District of Maryland further charges:

On or about the 30th day of August, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

knowingly and wilfully made false and fraudulent representations to an Agent of the Drug Enforcement Administration in violation of Title 18, United States Code, Section 1001.

18 U.S.C. §1001

COUNT FIVE

And the Grand Jury for the District of Maryland further charges:

On or about the 13th day of September, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

knowingly and wilfully made false and fraudulent representations to an Agent of the Drug Enforcement Administration in violation of Title 18, United States Code, Section 1001.

18 U.S.C. §1001

COUNT SIX

And the Grand Jury for the District of Maryland further charges:

On or about the 30th day of August, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

knowingly and intentionally did furnish fraudulent material information in the form of records required to be kept under Title 21, United States Code, Section 827(a)(3), in violation of Title 21, United States Code, Section 843(a)(4).

21 U.S.C. §843(a)(4)

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges:

On or about the 17th day of September, 1973, in the State and District of Maryland,

DR. DONALD E. MULES, DVM
DEA REGISTRANT #AM 1531309

knowingly and wilfully made false and fraudulent representations to an Agent of the Drug Enforcement Administration in violation of Title 18, United States Code, Section 1001.

18 U.S.C. §1001

veracity, called by the Defendant, inquired as to his knowledge of the alleged investigation of Pete Curtis leading to his indictment for the possession of cocaine.

7. That the Court erred in permitting the Government over the continuing objection of the Defendant to elicit testimony from the Defendant concerning his financial affairs, which testimony the Government elicited for the alleged purpose of establishing "motive."

8. That the Court erred in refusing to grant the Defendant's Motion for a Mistrial with respect to the conduct of counsel for the Government in referring to the Defendant's actions as the diversion of cocaine when in fact all charges in the indictment related only to records, fraudulent statements and fraudulent representations.

9. That the Defendant was substantially prejudiced and deprived of a fair trial by reason of the improper statements of the attorney for the Government made in his closing argument as follows:

a. That the evidence showed that Dr. Donald E. Mules, DVM was the only veterinarian in Maryland using cocaine, which said statement was false and known to be false at the time made by counsel for the Government.

b. That the evidence showed that the Defendant had made excessive purchases of methadone and had thought he was once again getting away with something, which statement when made by counsel for the Government, was false and known by counsel for the Government to be false.

c. That counsel for the Government, contrary to the canons of the legal profession, inserted his personal experience as a prosecutor in his closing argument and attempted to draw an analogy between the instant case and other cases in which he was a prosecutor, stating words to the effect that most

individuals who commit criminal offenses are likely to get caught and further mentioning the experience of the prosecutor with respect to bank robbery cases, an experience that was disclaimed by counsel for the Government during a colloquy at the bench between the Court and counsel.

d. That the attorney for the Government further stated in his argument, without there being any evidence with respect to the point, that the agents for the Federal Government were trained to remember, trained to get information and that with respect to the fraudulent statement counts 4, 5 and 7 that said agents were therefore better able to recollect the substance of conversations then would the Defendant.

10. That the jury in finding the Defendant not guilty of Count 5 specifically under the Court's instructions had to find that statement to Dr. Booth that his cough medication contained two tablespoons of cocaine was in fact true and therefore the jury's conviction of the Defendant under Count 7 is inconsistent in that the statement alleged under Count 7 was that the Defendant in calling Agent William Miller said that two tablespoons of cocaine were placed in his cough medication and by inference that this was used in the previous cough medications.

11. That the jury in finding that Defendant not guilty of Count 5 and guilty of Count 4, returned an inconsistent verdict with respect to Count 4 in that the fraudulent statements alleged in Count 4 were that the cough syrup and osteogen contained cocaine which statements were the same statements alleged to have been made by the Defendant on September 13, 1973 as alleged in Count 5 of the indictment.

12. That the evidence failed to show with specificity that with respect to the two year periods prior to August 30, 1973 that the Defendant did in fact dispense and therefore there was no evidence to sustain a finding of guilt as to Count 2

and further with respect to Count 8 and 6 Defendant not having been required to keep any records, could not be found guilty of furnishing or omitting to furnishing fraudulent material in the form of records required to be kept.

13. That the conviction in Count 4 of making a false and fraudulent representation was predicated on the alleged statement of the Defendant concerning the date of August 12 written on the bottle of cocaine hydrochloride and the conviction in Count 6 was predicated on the same data constituting the furnishing of fraudulent material in the form of records required to be kept. That the statement with respect to the cocaine bottle and the writing thereon cannot both sustain findings of guilt as to criminal conduct as both concern and arise out of the exact same transaction.

14. That with respect to Count 1 the uncontroverted testimony of the Defendant and the Agents for the Federal Government was that said records had been misplaced or lost and therefore the evidence did not support a finding of guilt with respect to Count 1.

15. That with respect to Count 4 alleging a false statement on August 30th concerning the inventory, and Count 6 alleging the furnishing of a fraudulent inventory, the Defendant was not required to keep such an inventory and therefore the statement was not material as required by Count 4 and not being required to keep same, his conviction cannot be sustained as to Count 6.

/s/William F.C. Marlow, Jr.

/s/Edward C. Covahey, Jr.,
614 Bosley Avenue
Towson, Maryland 21204
828-9441
Attorneys for Defendant

CITATIONS OF MAIN POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

Federal Rule 33, Federal Rules of Criminal Procedure for District Court.

U.S. v. Surano, 496 F2d 81 (1974)

U.S. v. Perez, 493 F2d 1339 (1974)

U.S. v. LeFever, 483 F2d 477 (1973)

U.S. v. Sawyer, 347 F2d 372 (1965) (USCA 4th)

STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

TITLE 18, UNITED STATES CODE

Section 1001. Statement or entries generally.—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document know-

ing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years or both.

TITLE 21, UNITED STATES CODE

§ 827. Records and reports of registrants

(a) Except as provided in subsection (c) –

(1) every registrant under this title shall, on the effective date of this section, or as soon thereafter as such registrant first engages in the manufacture, distribution, or dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand, except that the regulations prescribed under this section shall permit each such biennial inventory (following the initial inventory required by this paragraph) to be prepared on such registrant's regular general physical inventory date (if any) which is nearest to and does not vary by more than six months from the biennial date that would otherwise apply;

(2) on the effective date of each regulation of the Attorney General controlling a substance that immediately prior to such date was not a controlled substance, each registrant under this title manufacturing, distributing, or dispensing such substance shall make a complete and accurate record of all stocks thereof on hand, and

(3) on and after the effective date of this section, every registrant under this title manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

(b) Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of nonnarcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and be available, for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

(c) The foregoing provisions of this section shall not apply–

(1)(A) with respect to narcotic controlled substances in schedule II, III, IV, or V, to the prescribing or administering of such substances by a practitioner in the lawful course of his professional practice; or (B) with respect to nonnarcotic controlled substances in schedule II, III, IV, or V, to any practitioner who dispenses such substances to his patients, unless the practitioner is regularly engaged in charging his patients, either separately or together with charges for other professional services, for substances so dispensed;

(2)(A) to the use of controlled substances, at establishments registered under this title which keep records with respect to such substances, in research conducted in conformity with an exemption granted under section 505(i) or 512(j) of the Federal Food, Drug, and Cosmetic Act [21 USCS § 355(i) or § 360b(j)];

(B) to the use of controlled substances, at establishments registered under this title which keep records with respect to such substances, in preclinical research or in teaching; or

(3) to the extent of any exemption granted to any person, with respect to all or part of such provisions, by the Attorney General by or pursuant to regulation on the basis of a finding that the application of such provisions (or part thereof) to such person is not necessary for carrying out the purposes of this title.

(d) Every manufacturer registered under section 303 [21 USCS § 823] shall, at such time or times and in such form as the Attorney General may require, make periodic reports to the Attorney General of every sale, delivery, or other disposal by him of any controlled substance, and each distributor shall make such reports with respect to narcotic controlled substances, identifying by the registration number assigned under this title the person or establishment (unless exempt from registration under section 302(d) [21 USCS § 823(d)]) to whom such sale, delivery, or other disposal was made.

(e) Regulations under sections 505(i) and 512(j) of the Federal Food, Drug, and Cosmetic Act [21 USCS §§ 355(i), 360b(j)], relating to investigational use of drugs, shall include such procedures as the Secretary, after consultation with the Attorney General, determines are necessary to insure the security and accountability of controlled substances used in research to which such regulations apply.

§ 828. Order forms

(a) It shall be unlawful for any person to distribute a controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) and regulations prescribed by him pursuant to this section.

(b) Nothing in subsection (a) shall apply to–

(1) the exportation of such substances from the United States in conformity with title III;

(2) the delivery of such a substance to or by a common or contract carrier for carriage in the lawful and usual course of its business, or to or by a warehouseman for storage in the lawful and usual course of its business; but where such carriage or storage is in connection with the distribution by the owner of the substance to a third person, this paragraph shall not relieve the distributor from compliance with subsection (a).

(c)(1) Every person who in pursuance of an order required under subsection (a) distributes a controlled substance shall preserve such order for a period of two years, and shall make such order available for inspection and copying by officers and employees of the United States duly authorized for that purpose by the Attorney General, and by officers or employees of States or their political subdivisions who are charged with the enforcement of State or local laws regulating the production, or regulating the distribution or dispensing, of controlled substances and who are authorized under such laws to inspect such orders.
(2) Every person who gives an order required under subsection (a) shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued by the Attorney General in blank in accordance with subsection (d) and regulations prescribed by him pursuant to this section, and shall, if such order is accepted, preserve such duplicate for a period of two years and make it available for inspection and copying by the officers and employees mentioned in paragraph (1) of this subsection.

(d) (1) The Attorney General shall issue forms pursuant to subsections (a) and (c)(2) only to persons validly registered under section 303 [21 USCS § 823] (or exempted from registration under section 302(d) [21 USCS § 822(d)]). Whenever any such form is issued to a person, the Attorney General shall, before delivery thereof, insert therein the name of such person, and it shall be unlawful for any other person (A) to use such form for the purpose of obtaining controlled substances or (B) to furnish such form to any person with intent thereby to procure the distribution of such substances.
(2) The Attorney General may charge reasonable fees for the issuance of such forms in such amounts as he may prescribe for the purpose of covering the cost to the United States of issuing such forms, and other necessary activities in connection therewith.

(e) It shall be unlawful for any person to obtain by means of order forms issued under this section controlled substances for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or in the course of his professional practice or research.

§ 842. Prohibited acts B – Penalties

(a) It shall be unlawful for any person –
(1) who is subject to the requirements of part C [21 USCS §§ 821-829] to distribute or dispense a controlled substance in violation of section 309 [21 USCS § 829];
(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;
(3) who is a registrant to distribute a controlled substance in violation of section 305 of this title [21 USCS § 825];
(4) to remove, alter, or obliterate a symbol or label required by section 305 of this title [21 USCS § 825];
(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this title or title III;
(6) to refuse any entry into any premises or inspection authorized by this title or title III;
(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 304(f) or 511 [21 USCS § 824(f) or 881] or to remove or dispose of substances so placed under seal; or
(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this title or title III, any information acquired in the course of an inspection authorized by this title concerning any method or process which as a trade secret is entitled to protection.

(b) It shall be unlawful for any person who is a registrant to manufacture a controlled substance in schedule I or II which is –

(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 306 [21 USCS § 826]; or

(2) in excess of a quota assigned to him pursuant to section 306 [21 USCS § 826].

(c) (1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of title 28 of the United States Code to enforce this paragraph.

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

(3) Except under the conditions specified in paragraph (2) of this subsection, a violation of this section does not constitute a

crime, and a judgment for the United States and imposition of a civil penalty pursuant to paragraph (1) shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense.

§ 843. Prohibited acts C – Penalties

(a) It shall be unlawful for any person knowingly or intentionally –

(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 308 of this title [21 USCS § 828];

(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this title or title III; or

(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this title or title III. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication.

(c) Any person who violates this section shall be sentenced to a term of imprisonment of not more than 4 years, a fine of not more than $30,000, or both; except that if any person commits such a violation after one or more prior convictions of him for violation of this section, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 8 years, a fine of not more than $60,000, or both.

Supreme Court, U. S.
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No. 75-1372

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD E. MULES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
MICHAEL MOORE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1976 (Pet. App. A. 1 to A. 2), and a petition for rehearing was denied on February 24, 1976 (Pet. App. A. 3). The petition for a writ of certiorari was filed on March 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain of the prosecutor's comments, questions, and closing arguments denied petitioner a fair trial.

2. Whether the court properly instructed the jury on the *mens rea* required for a criminal violation of the narcotic inventory requirements of 21 U.S.C. 842(a)(5).

3. Whether petitioner's conviction for furnishing fraudulent information in and omitting material information from records required to be kept by law was improper in light of the fact that the records themselves were not voluntarily "furnished" to the government.

4. Whether the evidence was sufficient to show that certain notations petitioner made on a bottle label were "dispensing records."

5. Whether the indictment was defective because it did not charge that certain fabrications were "material" to a matter "within the jurisdiction" of a federal agency, and whether petitioner's conduct as charged violated 18 U.S.C. 1001.

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of failing to maintain an accurate record of cocaine distributed to him for use in his veterinary practice, in violation of 21 U.S.C. 842(a)(5) (Count 1); of failure to maintain accurate cocaine dispensing records, in violation of 21 U.S.C. 842(a)(5) (Count 2); of furnishing fraudulent information concerning his use of cocaine in records required to be kept by law, in violation of 21 U.S.C. 843(a)(4) (Counts 6 and 8); and of making false and fraudulent representations to agents of the Drug Enforcement Administration, in violation of 18 U.S.C. 1001 (Counts 4 and 7). Petitioner was sentenced to one year's imprisonment on Counts 1 and 2 and three years' imprisonment on each of Counts 4, 6, 7, and 8. All terms run concurrently. The court of appeals affirmed *per curiam* without opinion.

The material facts are not in dispute. Agents of the Drug Enforcement Administration conducted a routine inspection of petitioner's offices on August 30, 1973. They questioned him concerning his use of cocaine in his veterinary practice, his maintenance of the statutorily required

records documenting his receipt and dispensation of cocaine, and the amount of cocaine then on the premises. Petitioner stated during the interview that he kept no inventory or dispensing records; however, when showing the agents a five-ounce bottle containing his current stock of cocaine, petitioner claimed that he made handwritten notations on the label to keep track of the amount of cocaine removed from the bottle.

The agents asked petitioner to produce copies of the order forms with which he had obtained cocaine from a local pharmaceutical firm during the past two years. Petitioner produced only six such forms, although federal records indicated that petitioner had placed substantially more than six orders during that period. Petitioner also told the agents that he used cocaine as an ingredient in three different medical preparations, and he specified the exact amounts of the drug used in each. Petitioner repeated these figures to one of the agents during a telephone conversation on September 17, 1973.

Subsequent investigation revealed that petitioner had in fact maintained the inventory records requested by the agents (but denied to them) on August 30, that the handwritten notations on the bottle of cocaine were inaccurate, and that his statements to the agents regarding the amounts of cocaine used in the three medical preparations were false. These misrepresentations were the subject matter of Counts 4 and 7 of the indictment. The inaccurate bottle label notations formed the basis of Count 6.

In April 1974, pursuant to a search warrant, agents seized from petitioner's offices treatment records and controlled substances order forms, all of which were required to be kept by law. Other similar records then in the possession of petitioner's attorney were furnished in response to a subpoena. These were the materials which petitioner had denied existed during the August 30 visit.

They were found to contain serious inaccuracies and material omissions and were the subject matter of Count 8 of the indictment. Petitioner's general failure to keep complete and accurate records of his purchases and use of cocaine, as required by 21 U.S.C. 827, led to his conviction on Counts 1 and 2.

ARGUMENT

1. Petitioner contends that certain of the prosecutor's questions, comments, and closing arguments denied him a fair trial.

a. On direct examination Anthony B. Buck, the veterinary supplies distributor from whom petitioner ordered cocaine, testified that most of his company's dealings in controlled substances involved the distribution of barbiturates to veterinarians who used the drugs for "euthanasia." The prosecutor's attempt to elicit from the witness a definition of "euthanasia" produced the following exchange (Tr. 38-39):

Q:	By euthanasia, you mean when an animal has to be - - -
MR. COVAHEY:	[defense counsel] Your Honor, I would object for the interest of expcdiency.
THE COURT:	He's got to paint some background, counsel.
MR. COVAHEY:	Very well, Your Honor.
MR. RADDING:	[the prosecutor] What are you afraid of, Mr. Covahey?
BY MR. RADDING:	
Q:	What is euthanasia?

MR. COVAHEY:	Your Honor, I would move that the jury be instructed to disregard his statement as to what I am afraid of that he made.
THE COURT:	All right. All right. Go on.

Petitioner apparently contends (Pet. 16) that the prosecutor's rhetorical question implied to the jury that defense counsel was "afraid" because he knew his client was guilty. However, when read in the context of the entire exchange, the prosecutor's remark could not have been so construed. At the time defense counsel raised his objection, the prosecutor was attempting to develop background information concerning matters unrelated to petitioner's guilt or innocence. It would thus be unreasonable to conclude that the jury found this remark relevant to any of the ultimate issues in the case. In any event, the court granted defense counsel's request for a curative instruction and later in the trial issued a clear admonition to the jury to ignore this sort of bickering between counsel (Tr. 1342).

b. Petitioner also objects (Pet. 7-8, 16-17) to certain of the prosecutor's questions during cross-examination of petitioner. But the trial court adequately dealt with these questions by sustaining defense counsel's objections to three of them (petitioner answered before the court could rule on defense counsel's objection to the fourth) (Tr. 1098, 1121-1122, 1289) and by instructing the jury on at least two occasions that the remarks of counsel were not evidence and should be disregarded (Tr. 1342, 1744-1746).

c. Petitioner asserts that he was prejudiced by the prosecutor's two attempts to elicit testimony that one of petitioner's associates had been arrested for possession of cocaine (Pet. 8-9, 16). These attempts, however, were

unsuccessful. The trial court sustained objections to the questions and, in its final charge, instructed the jury "to concern yourselves only with the offenses before you and any other inferences concerning [petitioner's] conduct or anybody closely associated with him are not to be considered" (Tr. 1787-1788).

d. Petitioner urges (Pet. 9-10) that certain of the prosecutor's comments during closing argument (to which counsel did not object at trial) were improper. The record shows that the prosecutor did not exceed the bounds of proper argument.

Petitioner first objects to the prosecutor's statement (Arg. Tr. 8)[1] that "[w]hen you're dealing with narcotics, the most dangerous drugs known to man, you've got to follow what the Government says. Of course, if you don't, we're all in trouble, and I would urge upon you that's what has happened here." When read in context, these remarks did not suggest, as petitioner apparently argues, that the jury has a duty to agree with the prosecutor's argument. Rather, "what the Government says" referred to the Drug Abuse Control Act's record-keeping regulations, and "you" referred to petitioner. The argument was made in response to the thrust of petitioner's defense, which was that he had not thought that the record-keeping requirements were important and therefore had not kept accurate records. See also Arg. Tr. 2-5.

Petitioner also objects to the prosecutor's statement (Arg. Tr. 11-12) that "I can tell you, from my experience as a criminal lawyer and prosecutor that very few people who commit crimes really expect to be caught, and they always feel they're smart enough to outsmart the law." The jury could not, however, have interpreted the remark

[1]"Arg. Tr." refers to the transcript of excerpts from closing arguments on December 18, 1974.

as an invitation to rely upon the prosecutor's experience in assessing petitioner's guilt. The prosecutor made it clear that he was responding to defense counsel's argument that, if petitioner had known about the government's record-keeping requirements, he would not have been "stupid enough to falsify or not fill [the records] out" (Arg. Tr. 11).

Finally, petitioner contends that the prosecutor improperly vouched for the credibility of a government chemist's testimony in the following portion of his closing argument (Arg. Tr. 14):

> These people are professionals. They work for the United States Government. Like myself, like anybody else who works for the Government, they're paid every other Friday, whether or not they make a case, whether or not they testify in Court, whether or not there is a conviction, whether or not somebody goes to jail, it doesn't matter.
>
> They have no ax to grind. They have nothing to prove.* * *

The prosecutor was attempting to rehabilitate the chemist's credibility in response to defense counsel's suggestion (Tr. 310) that the chemist had been paid to testify. The argument was proper.

2. Petitioner argues (Pet. 22-25) that the trial court misinstructed the jury on the state of mind required for a criminal violation of 21 U.S.C. 842(a)(5). He contends that the government must show that he committed the record-keeping offenses charged in Counts 1 and 2 "wilfully * * *, and with the specific intent to do something the law forbids, that is to say, with bad purpose, either to disobey or to disregard the law" (Pet. App. A. 4).

The statute does not require a showing of bad motive. 21 U.S.C. 842(c)(2)(A) states that a person may be held

criminally liable for violations of Section 842(a) if those violations were committed "knowingly." Terms such as "wilful" and "bad purpose" do not appear in the statute.[2] Thus, the court properly instructed the jury that a verdict of guilty on Counts 1 and 2 must rest upon a finding that petitioner "acted knowingly * * * [with] knowledge of all the underlying facts, including the existence of the record keeping requirements, and that he acted voluntarily and deliberately in failing to keep" the pertinent records (Tr. 1764, 1770).

3. Petitioner urges (Pet. 20-21) that he did not "furnish" false and fraudulent records within the meaning of 21 U.S.C. 843(a)(4), as charged in Count 8, because the government used a search warrant and a subpoena to obtain those records. But the statute prohibits the furnishing of "false or fraudulent material *information in* * * * any * * * record" required to be kept (emphasis added). Petitioner placed false information into records that he was required to maintain. The means by which the government obtains the records themselves is irrelevant to the actor's liability.

4. Petitioner contends (Pet. 18-19) that the notations found on the cocaine bottle label during the August 30, 1973, regulatory inspection were not "dispensing

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[2]Petitioner's reliance (Pet. 22-23) on cases construing 18 U.S.C. 871, which requires that the offense described therein must be committed "knowingly and willfully," is therefore misplaced.

Petitioner apparently construes the language in 21 U.S.C. 842(a) that "[i]t shall be unlawful" to commit the enumerated acts as requiring a showing of wilfulness. But if Congress had intended the introductory phrase to have such an effect, it would have been unnecessary to include in Section 842(c)(2)(A) a requirement of showing of "knowledge." Petitioner's construction also would render meaningless the distinction drawn in Section 842(c) between civil and criminal violations of Section 842(a).

records" and that, as a result, his conviction on Count 6 cannot stand.

The question whether petitioner made these notations as "dispensing records" was properly submitted to the jury after careful instruction from the court (Tr. 1780).[3] Agent William Miller testified at trial that petitioner produced the bottle label after the inspecting agents had requested to see his dispensing records, and that petitioner claimed that the notations on the label accurately documented his use of cocaine (Tr. 99-103). Moreover, Agent Randolph Harper testified that the notations included all of the information required to be kept in dispensing records (Dec. 4, 1974 Tr. 82). Thus, when viewed in the light most favorable to the government (*Glasser* v. *United States*, 315 U.S. 60, 80), there was sufficient evidence from which the jury could conclude that the notations constituted dispensing records.

5. Petitioner alleges (Pet. 25-29) that Counts 4 and 7 of the indictment, charging violations of 18 U.S.C. 1001, were fatally defective on two independent grounds. Petitioner also argues (Pet. 29-33) that the conduct alleged in Counts 4 and 7 was not properly punishable under 18 U.S.C. 1001. There is no need for this Court to review these claims. The sentences imposed on those counts were equal to and concurrent with the sentences imposed in connection with petitioner's unquestionably valid convictions on Counts 6 and 8. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16. In any event, these claims are incorrect.

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[3]The notations are "dispensing" records under 21 U.S.C. 802(10) and 827(a)(3) if they reflect a transfer of a controlled substance to an "ultimate user." Petitioner himself testified that he administered cocaine to animals, making him an "ultimate user" under 21 U.S.C. 802(25). The question whether the bottle notations were "dispensing records" therefore became one of fact, turning, as the court instructed the jury, upon the purpose for which they had been made.

a. Petitioner contends (Pet. 28-29) that the indictment was defective because it does not contain an explicit allegation that his false statements concerned matters "within the jurisdiction of any * * * agency of the United States" (18 U.S.C. 1001). But an indictment need not charge each element of the crime in the exact words of the statute. It is enough that the required allegations may be fairly implied from the language employed in the indictment. *United States* v. *Barbato*, 471 F. 2d 918, 921 (C.A. 1); *United States* v. *Silverman*, 430 F. 2d 106, 111-112 (C.A. 2), certiorari denied, 402 U.S. 953. Counts 4 and 7 specifically identified petitioner as a "DEA Registrant," that is, one who is subject to that agency's regulatory jurisdiction governing the medical use of controlled substances.[4] The person to whom petitioner was alleged to have made the fraudulent misrepresentations was identified in each count as "an Agent of the Drug Enforcement Administration." Thus, when read as a whole and interpreted in a common sense manner (*United States* v. *Hand*, 497 F. 2d 929 (C.A. 5)), each count adequately charged that petitioner made false and fraudulent statements concerning matters within the jurisdiction of the Drug Enforcement Administration.[5]

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[4]The indictment is set out at Pet. App. A. 6 to A. 10.

[5]Neither *Rolland* v. *United States*, 200 F. 2d 678 (C.A. 5), certiorari denied, 345 U.S. 964, nor *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8), conflicts with the decision below, as petitioner apparently claims (Pet. 28-29). The indictment in *Rolland* was dismissed on the ground, *inter alia*, that it failed to allege sufficient facts from which an allegation of "materiality" could be implied. In *Friedman* the court dismissed the indictment after deciding that, although the indictment sufficiently alleged that the false statements concerned matters "within the jurisdiction of the Federal Bureau of Investigation," the Bureau's general investigative jurisdiction over violations of the criminal law was not the sort of "jurisdiction" covered by 18 U.S.C. 1001.

b. Petitioner also contends (Pet. 25-28) that Counts 4 and 7 were insufficient because they failed to allege specifically that the false statements were "material." But the defect, if any,[6] is not fatal because it did not deprive petitioner of any of the protections which the right to prosecution by indictment was intended to confer. See Fed. R. Crim. P. 7 and 52(a).

The indictment disclosed the subject matter of the false statements with sufficient specificity to ensure that petitioner could successfully plead former jeopardy as a bar to any future prosecution for the same offense. *Russell* v. *United States*, 369 U.S. 749, 764. Moreover, it is undisputed that petitioner received actual notice prior to trial of the contents of the statements which underlay these charges, as well as the persons to whom and the dates on which the statements were alleged to have been made. His defense was not hampered by the omission from the indictment. The mere addition of the words "of a material fact" to the language of Counts 4 and 7 would not have aided petitioner in the preparation of his case for trial.[7] *Russell* v. *United States*, *supra*, 369 U.S. at 765-766.

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[6]The Second Circuit has held that "materiality" is not an element of the offense described by the clause of 18 U.S.C. 1001 under which petitioner was charged, and thus need not be alleged. *United States* v. *Silver*, 235 F. 2d 375, 377-378. But see *United States* v. *McGough*, 510 F. 2d 598, 602 (C.A. 5). For the reasons set out in the text (and in light of the concurrent sentence doctrine) there is no need to resolve that conflict in this case. The Fourth Circuit itself has taken the position that Section 1001 "proscribes only those falsifications which pertain to material facts" (*United States* v. *Zambito*, 315 F. 2d 266, 268), but evidently did not find that this required the reversal of petitioner's convictions.

[7]Before submitting the case to the jury, the court found that the alleged statements were material as a matter of law and so instructed the jury (Tr. 1775).

c. Petitioner finally contends (Pet. 29-33) that his fraudulent misrepresentations were not within the class of statements that 18 U.S.C. 1001 was intended to proscribe.

Congress intended 18 U.S.C. 1001 "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described" (*United States* v. *Gilliland*, 312 U.S. 86, 93). Among the functions assigned to the Drug Enforcement Administration is the licensing and registration of medical users of controlled substances in the United States. In aid of its regulatory jurisdiction, it has been empowered to conduct administrative inspections of "controlled premises" for the purpose of "inspecting, copying, and verifying the correctness of records, reports, or other documents required to be kept [by its registrants]" (21 U.S.C. 880(b)) and to suspend or revoke the registrations of those convicted of criminal violations of, *inter alia*, 21 U.S.C. 842 and 843. During a proper administrative inspection of his premises, petitioner repeatedly lied to agents about his use of cocaine in his veterinary practice and his compliance with the record-keeping requirements of 21 U.S.C. 827. Those statements inevitably tended to obstruct the Drug Enforcement Administration in the performance of its regulatory functions and were therefore well within the intended scope of 18 U.S.C. 1001.

Petitioner nevertheless urges that his statements were not properly punishable because they were "oral and unsworn" and were "merely answers to the inquiries of a Drug Enforcement Administration agent, and were devoid of any aggressive or voluntary aspect" (Pet. 31). It is established, however, that neither an oath (see *Neely* v. *United States*, 300 F. 2d 67, 71 (C.A. 9), certiorari denied, 369 U.S. 864) nor a writing (see *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46) is required under the statute. Nor does the fact that the statements were made in response to questions give

petitioner a right to lie or mislead.[8] Cf. *United States* v. *Mandujano*, No. 74-754, decided May 19, 1976; *Bryson* v. *United States*, 396 U.S. 64.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MICHAEL MOORE,
Attorneys.

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[8] Petitioner seeks to bring his statements within the "exculpatory no" doctrine, a judicially created exception to the false statement provisions of 18 U.S.C. 1001. Even if the doctrine is valid, it does not aid petitioner. The doctrine distinguishes "negative exculpatory denial[s]" made in response to accusations of wrongdoing from "affirmative representation[s] of facts peculiarly within the knowledge of the suspect not otherwise obtainable by the investigator," and removes the former category of statement from the coverage of 18 U.S.C. 1001. *United States* v. *Bush*, 503 F. 2d 813, 818 (C.A. 5). But petitioner's statements to the agents were not mere exculpatory denials in the face of accusatorial interrogation. Rather, he offered elaborate fabrications in response to general inquiries concerning the amount of cocaine he used for medicinal purposes and the type of records he kept.